313 U.S. 561

MAR 8 1941
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States.

October Term, 1940.

No. 824

The Columbian National Life Insurance Company,
Petitioner,

v.

Lena M. Rodgers,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERICK H. NASH,
BAILEY ALDRICH,
Attorneys for Petitioner.

LATHROP, CRANE, REYNOLDS, SAWYER & MERRIFIELD;
CHOATE, HALL & STEWART,
Of Counsel.

ROBERT G. DODGE & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Specification of errors	4
Reasons for granting the writ	4
Brief	9
Statement	9
Argument	10
1. Under the uniform Kansas law there is no duty of inquiry into fraud unless the truth of the statements appears "unreasonable and improbable"	10
2. The court held against the defendant on a matter required to be, but not, pleaded, and as to which the defendant had no warning	14

TABLE OF AUTHORITIES CITED.

Armourdale State Bank v. Homeland Ins. Co., 134 Kan. 245; 5 P. (2d) 786	13
Bowland v. McDowell, 132 Kan. 820; 297 Pac. 691	13
Carpenter v. Baltimore & O. R. Co., 109 F. (2d) 375	17
Cottom v. Ins. Co., 65 Kan. 511; 70 Pac. 357	15
Dangerfield v. Ry. Co., 62 Kan. 85; 61 Pac. 405	11, 14
Dunlap v. Denison, 83 Kan. 757; 112 Pac. 598	13
Harvester Co. v. Hardware Co., 101 Kan. 488; 167 Pac. 1057	12, 14
Horvath v. McCord Radiator & Mfg. Co., 100 F. (2d) 326	17
Hunter Milling Co. v. Koch, 82 F. (2d) 735	15, 16

	Page
Jefferson Standard Life Ins. Co. v. Stevenson, 70 F. (2d) 72	13n.
Maelzer v. Swan, 75 Kan. 496; 89 Pac. 1037	13
Mangum v. Stadel, 76 Kan. 764; 92 Pac. 1093	13
Murray v. Davies, 77 Kan. 767; 94 Pac. 283	12
Priest v. Kansas City Life Ins. Co., 116 Kan. 421; 227 Pac. 538	12
Smith v. Rector, 135 Kan. 326; 10 P. (2d) 1077	13
Southern Ry. Co. v. Montgomery, 46 F. (2d) 990	17
Speed v. Hollingsworth, 54 Kan. 436; 38 Pac. 496	12
Stadel v. Aikins, 65 Kan. 82; 68 Pac. 1088	13
Stanley v. Belt Automobile Indemnity Ass'n, 112 Kan. 412; 210 Pac. 1096	13
Twachtman v. Connelly, 106 F. (2d) 501	17
U.S. Fid. & G. Co. v. Dye, 52 F. (2d) 567	17
Union Pac. R. Co. v. Garner, 24 F. (2d) 53	17
Vaughn v. Hixon, 50 Kan. 773; 32 Pac. 358	11
Washington R.R. v. Bradleys, 10 Wall. 299	16
Federal Rules of Civil Procedure, Rule 8(c)	15, 17

In the

Supreme Court of the United States.

October Term, 1940.

No.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,
v.
LENA M. RODGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered December 30, 1940 in the case between the above-named parties docketed therein as No. 2131.

Opinions Below.

No opinions were filed by the District Court. The opinion of the Circuit Court of Appeals appears at pages

115 to 119 of the Record and has been printed in 116 F. (2d) 705. A former opinion was printed in 93 F. (2d) 740.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 30, 1935 (R. 119). A petition for rehearing was denied February 3, 1941 (R. 137).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The action to which this petition relates is an action at law removed from the State Court of Kansas on the grounds of diversity of citizenship to recover the death benefits payable under a policy of life insurance, in which the defense was fraud in the application.

Questions Presented.

Two questions are presented:

1. Where the evidence discloses that an insurer has means of discovering the falsity of a fraudulent and material misrepresentation can the federal court apply the law of estoppel by constructive notice in the face of the unanimous state decisions that that principle is not applicable where there have been fraudulent misrepresentations?

2. Where waiver solely by actual and express knowledge has been pleaded can the court render a decision on a theory of estoppel based upon constructive knowledge raised for the first time after the evidence is closed?

Statement.

The plaintiff-respondent Rodgers, beneficiary under a policy issued by the defendant-petitioner, brought a suit on

the policy within the contestable period to recover the face of the policy due upon the death of the insured. The sole defense pleaded was that the insured had falsely denied a declination by another company.* The plaintiff filed a reply claiming that the defendant had full knowledge of the declination prior to its issuance of the policy and accordingly waived or was estopped from setting up this defense. The case was tried on these issues, resulting in a verdict for the plaintiff. On appeal the Circuit Court of Appeals ruled that the evidence (all of which was by deposition) established fraud of the insured and the materiality of the misrepresentations as matter of law. Under the practice then in force it sent the case back for a new trial. 93 F. (2d) 740.

At the second trial the identical depositions were presented with no further material evidence on the question of the fraudulent and material character of the misrepresentations. It is accordingly the law of the case that on this issue the defendant is entitled to prevail. The evidence in support of the plaintiff's contention that the defendant had actual knowledge that the misrepresentations were false before it issued the policy was argued by the defendant to be insufficient, but was not passed upon by the Circuit Court of Appeals. The Circuit Court of Appeals rested its second decision solely upon the proposition that the defendant could have, and accordingly should have, ascertained the true facts, and was accordingly barred by equitable estoppel. The defendant argued before the Circuit Court of Appeals that neither the evidence nor the law justified such a decision, and further argued that this point was not open on the pleadings. In its opinion the court did not mention the procedural question although its decision directly violated a previous ruling of its own in a case removed from the same state, and did not discuss the unani-

*Material as a matter of law. *Scott* v. *National Reserve Life Ins. Co.*, 144 Kan. 224; 58 P. (2d) 1131.

mous Kansas cases cited by the defendant to the effect that no duty of inquiry and no equitable estoppel is to be raised in favor of one who has been guilty of a conscious misrepresentation. The court decided contrary to these cases by relying upon purported analogies which the Kansas Court itself has stated to be "perfectly obviously . . . of no consequence" to the issue raised in this case, thereby disregarding completely the established Kansas law.

Specification of Errors.

The Circuit Court of Appeals erred

1. In refusing to follow the decisions of the Kansas Supreme Court which have been stated by that court to be the only ones pertinent to the issue.

2. In holding that under a plea, and after a statement of counsel, that he relied upon waiver by actual knowledge, without further notice to the defendant it was open to the court to decide on a claim of equitable estoppel by constructive knowledge.

Reasons for Granting the Writ.

1. It is common knowledge that every insurance company has means of making an investigation, if it wishes to spend the time and money, to check the accuracy of statements in applications for insurance. The decision of the Circuit Court of Appeals is that a company is bound to employ such means, and cannot rely upon a conscious and deliberate material misrepresentation of the insured, where in the ordinary course of business it possessed records indicating a possibility that the statements were false, but which records were *equally consistent* with the application's entire truthfulness. *All* insurance companies possess these rec-

ords, which are furnished by a national distributing company (R. 58). No prior case is known which makes the possession of such records raise a duty of further inquiry where the records disclose *no facts inconsistent with the statements in the application.* The decision below in so holding is of extreme importance to every insurance company. It is not only unjustified by the Kansas cases, but is directly contrary to at least three applicable and unquestioned Kansas decisions.

Speed v. *Hollingsworth,* 54 Kan. 436; 38 Pac. 496.

Murray v. *Davies,* 77 Kan. 767; 94 Pac. 283.

Priest v. *Kansas City Life Ins. Co.,* 116 Kan. 421, 428.

See *Harvester Co.* v. *Hardware Co.,* 101 Kan. 488; 167 Pac. 1057.

See also *Vaughn* v. *Hixon,* 50 Kan. 773; 32 Pac. 358.

Dangerfield v. *Ry. Co.,* 62 Kan. 85; 61 Pac. 405.

The Circuit Court of Appeals should not be permitted to state that it is bound by the Kansas law, and then rely on so-called analogous cases which that court itself has stated to be "perfectly obviously . . . of no consequence" in the premises,

Smith v. *Rector,* 135 Kan. 326, 329; 10 P. (2d) 1077, 1079;

See also *Harvester Co.* v. *Hardware Co.,* supra;

and disregard the unambiguously pertinent Kansas decisions.

2. In the original petition (R. 11), in the amended reply (R. 24), and even in the opening made *after* the deposi-

tions were taken on which he subsequently relied (R. 44), plaintiff's counsel based his affirmative defense of waiver and estoppel exclusively, and at the same time elaborately, upon the claim that the defendant possessed *actual and complete knowledge* of the falsity of the insured's misrepresentation. The defendant had no warning until after the evidence was closed that the plaintiff was going to make the additional and entirely different claim of equitable estoppel based on constructive knowledge attributable to it by virtue of an alleged duty of inquiry. It was never afforded an opportunity of introducing evidence to meet this new contention.

Waiver and estoppel must be proved the way they are pleaded. This is the law of Kansas; it was the law of the Tenth Circuit until the decision below;

> *Hunter Milling Co.* v. *Koch,* (CCA-10) 82 F. (2d) 735, citing and following the Kansas decisions;

and is the law generally.

> Note, 120 A.L.R. 8, 9, 21, 105, 124.

The decision below is entirely improper under the Federal Rules of Civil Procedure, and is in conflict with apposite decisions in other circuits.

> Rule 8(c).
>
> *Carpenter* v. *Baltimore & O. R. Co.,* (CCA-6) 109 F. (2d) 375.
>
> *Horvath* v. *McCord Radiator & Mfg. Co.,* (CCA-6) 100 F. (2d) 326.
>
> *Southern Ry. Co.* v. *Montgomery,* (CCA-5) 46 F. (2d) 990.
>
> *Union Pac. R. Co.* v. *Garner,* (CCA-8) 24 F. (2d) 53.

That the defendant was materially prejudiced is apparent both from the record of the trial and from the affidavits filed thereafter (R. 131-5).

Wherefore it is respectfully submitted that the petition should be granted.

FREDERICK H. NASH,
Attorney for Petitioner.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
CHOATE, HALL & STEWART,
Of Counsel.

Dated Boston, Massachusetts March 6, 1941.

In the

Supreme Court of the United States.

October Term, 1940.

No.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

LENA M. RODGERS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

In applying for the policy in suit the insured truthfully stated that he had outstanding policies in two other companies. He further stated that he had never been rejected by any other company. This second statement was a conscious falsehood, entitling the company to rescind. Decision on first appeal, 93 F. (2d) 740. The material evidence on this point was by deposition and was identical at both trials.

On all the affirmative testimony the defendant did not know that this representation was untrue (R. 82-85; 95).

The defendant did, however, possess a card furnished by the M.I.B. (the Medical Information Bureau). This card indicated that the insured had applied to "some other company, which company had created a certain record against him. The number of the card would not mean that he had been rejected; it would mean that he had had some sort of a history; it might be a rejection and it might not . . . *this number does not indicate in any way what action the company took on the applicant's application*" (R. 83). The number indicated "that there had been some general criticism of the man previously by another company" (R. 84), but in no way disclosed the extent of the criticism or how seriously it affected the risk. The reporting company may have issued the policy exactly as applied for (R. 61, 83), and as a matter of fact *the insured orally told the company that it had done so* (R. 95).

On this evidence the Circuit Court of Appeals ruled that the existence of the M.I.B. record "put the insurer on inquiry . . . because the reporting service . . . indicated that the applicant had either been declined or had been rated differently from the established rates, or that some other unusual circumstances were involved" (R. 118). In so far as this quotation may exceed what is stated in the preceding paragraph it is a conclusion by the court unsupported in the Record.

Argument.

1. UNDER THE UNIFORM KANSAS LAW THERE IS NO DUTY OF INQUIRY INTO FRAUD UNLESS THE TRUTH OF THE STATEMENTS APPEARS "UNREASONABLE AND IMPROBABLE."

No suggestion was made by the court below, and none could be made, that the defendant, in believing the statements in the application, was in the position of having re-

lied, in the light of all its actual knowledge, upon an "unreasonable and improbable" statement. In view of the extent of the information contained in the M.I.B. card, even apart from the insured's oral statement, there was *no inconsistency whatever* between the fact that a previous company had created a record against the applicant and his statement that he had two existing policies and had never been modified or rejected. On the contrary, it was *entirely consistent.* The court ruled, however, that "unusual circumstances" were involved, and because the defendant might have made further inquiry to test the applicant's truthfulness, it "is charged with notice of what the inquiry would have disclosed" and is "equitably estopped . . . from asserting the defense of fraud in the application" (R. 118). The only "unusual circumstances" were merely that some "general criticism" had been made by another company which, for all that appeared, may have issued the policy exactly as applied for. *And the applicant orally told the agent that he had in fact received the policy from that particular company* (R. 95). On this record the court below ruled that the defendant had a *duty of inquiry* to see if the applicant had told the truth, and was equitably estopped.

Equitable estoppel is like any other equitable principle. The Kansas cases are uniform to the effect that it is a defense not open to one who was himself guilty of fraud.

See *Vaughn* v. *Hixon,* 50 Kan. 773, 775; 32 Pac. 358, 359.

Dangerfield v. *Ry. Co.,* 62 Kan. 85, 88; 61 Pac. 405, 406.

The insured here has been ruled guilty of a deliberate, conscious and material falsehood. The beneficiary stands in his shoes. Decision on first appeal, 93 F. (2d) 740. If

the defendant went ahead actually knowing of the falsehood it could of course not now assert that defense. That would be inequitable.

It is not so bound, however, on any basis of constructive knowledge. As against deliberate falsehood by the insured and negligence of the insurer (if there were such) in not inquiring, the equities are entirely the other way.

> "It is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.' "
>
> *Speed* v. *Hollingsworth,* 54 Kan. 436, 440; 38 Pac. 496, 498.
>
> *Murray* v. *Davies,* 77 Kan. 767; 94 Pac. 283.
> *Priest* v. *Kansas City Life Ins. Co.,* 116 Kan. 421; 227 Pac. 538.

Even if a party actually goes upon real estate and could, by looking around, see that he was being defrauded, he is not estopped if he buys without investigating (*Murray* v. *Davies,* supra). Or if an insurance company examines an applicant, and could, by due care, learn that his health was not as represented, it is not estopped if it fails to exercise such care and issues the policy (*Priest* v. *Kansas City Life Ins. Co.,* supra).

The Kansas rule is that there is *no duty of inquiry* in the face of a positive and deliberate misrepresentation unless the circumstances are "so improbable or unreasonable" as to give the other party "cause to suspect that it is false."

> *Harvester Co.* v. *Hardware Co.,* 101 Kan. 488, 493; 167 Pac. 1057, 1059.

Information entirely consistent with the absolute truth of the representation obviously reveals nothing improbable or unreasonable whatever.*

The Circuit Court of Appeals cited no one of these Kansas cases. Instead it purported to rely upon the following decisions:

Armourdale State Bank v. *Homeland Ins. Co.*, 134 Kan. 245; 5 P. (2d) 786.
Bowland v. *McDowell*, 132 Kan. 820; 297 Pac. 691.
Stanley v. *Belt Automobile Indemnity Ass'n*, 112 Kan. 412; 210 Pac. 1096.
Dunlap v. *Denison*, 83 Kan. 757; 112 Pac. 598.
Mangum v. *Stadel*, 76 Kan. 764; 92 Pac. 1093.
Maelzer v. *Swan*, 75 Kan. 496; 89 Pac. 1037.
Stadel v. *Aikins*, 65 Kan. 82; 68 Pac. 1088.

Not one of these cases involves a conscious misrepresentation. A majority of them involve the familiar bona fide purchaser situation, where between two innocent parties the one who could be said to be negligent because of constructive knowledge will fail. The other cases are examples of what raises constructive knowledge. None of them holds, or even intimates, that such equitable doctrines are available to protect a wrongdoer from the consequences of his fraud. Indeed the Kansas Court has expressly stated that the two situations are *entirely different*, and that in deciding the law applicable to one the other line of cases is "*perfectly obviously . . . of no consequence.*"

Smith v. *Rector*, 135 Kan. 326, 329; 10 P. (2d) 1077, 1079.

---

*See, e.g., *Jefferson Standard Life Ins. Co.* v. *Stevenson*, (CCA-5) 70 F. (2d) 72.

Equitable estoppel is not to be applied in favor of fraud.

> "One practicing a deceit upon the other party is not entitled to invoke the equitable rule in his favor."
>
> *Dangerfield* v. *Ry. Co.*, 62 Kan. 85, 88; 61 Pac. 405, 406.

> "The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds."
>
> *Harvester Co.* v. *Hardware Co.*, 101 Kan. 488, 490; 167 Pac. 1057, 1058.

The Circuit Court of Appeals in refusing to accept this distinction as expressly laid down by the Kansas Court itself has refused to follow the Kansas law just as clearly as if it had purported to rely upon Kansas cases expressly overruled, or has tried to guess that the Kansas law would change. The Kansas cases which are clearly and unambiguously pertinent hold just the opposite of what the court below has decided.

2. THE COURT HELD AGAINST THE DEFENDANT ON A MATTER REQUIRED TO BE, BUT NOT, PLEADED, AND AS TO WHICH THE DEFENDANT HAD NO WARNING.

At the same time that the court below refused to apply the pertinent Kansas substantive law it refused as to procedure to apply the Kansas law, the previous law of its own court, the Federal Rules and the federal law.

In elaborate and detailed pleading, both by petition and reply, the plaintiff claimed that the defendant had full and complete knowledge "of all the facts . . . and was not misled in any way whatsoever" (R. 10, 24). This presented a

perfectly square issue, because if the defendant knew the facts it had not, and could not claim to have, relied on the misrepresentation. Testimony on this issue was taken by the plaintiff by oral depositions in Boston. Even after these depositions were taken, the plaintiff in a lengthy opening simply repeated his claim that the evidence would show that the defendant "with full knowledge of all these things issued the policy" (R. 44). At the argument, some weeks after the evidence was closed (R. 25, 33), the plaintiff raised for the first time the contention that the Boston depositions, if they did not show knowledge, showed an opportunity of obtaining knowledge, and that the defendant was estopped by reason of an unfulfilled duty to investigate. The defendant immediately moved to reopen the depositions, but its motion was denied upon the plaintiff's objection (R. 31). The case has now been decided against the defendant on that single issue. The defendant has never presented its defense, and has been manifestly prejudiced, unless for some reason it has been remiss. Although argued on the original argument (R. 122), and on the motion for rehearing (R. 122), the matter was never adverted to by the court below. A case almost squarely in point is that court's own decision in *Hunter Milling Co.* v. *Koch,* (CCA-10) 82 F. (2d) 735.

Under the Kansas law, if material, waiver and estoppel are affirmative matters.

Cottom v. *Ins. Co.,* 65 Kan. 511; 70 Pac. 357.

Rule 8(c) of the Federal District Court Rules provides, in part:

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . waiver, and any other matter constituting an avoidance or affirmative defense."

The exception sometimes referred to that these matters need not be pleaded when there is no further opportunity to plead does not apply here because the plaintiff did in fact file a reply, setting up waiver and estoppel, but basing it on the claim that the defendant "knew the facts connected with all matters claimed to have been misrepresented before issuing the policy" (R. 24).

The rule requiring waiver to be pleaded equally requires it to be proved in the fashion that it is alleged.

> *Hunter Milling Co.* v. *Koch,* supra (alleged waiver based on correspondence cannot be proved by subsequent oral conversations defendant has not opportunity to meet).

A claim that the defendant had full knowledge and therefore cannot be heard to say that it relied upon misrepresentations is obviously entirely different from the claim that the defendant should have investigated, and therefore should not have relied. The first is met simply by showing that the defendant did not in fact know and did rely—which is what the defendant sought to prove in meeting the Boston depositions. The other is obviously not met by such evidence, but is on the contrary predicated upon it. The defendant, therefore, when this new claim was made after the evidence was closed and when the right to reopen the evidence was denied to it, was left helpless and unprotected.

> "Allegations and proofs must agree, the court can consider only what is put in issue by the pleadings, averments without proofs and proofs without averments are alike unavailing."
>
> *Washington R.R.* v. *Bradleys,* 10 Wall. 299, 303.

> "It is well settled that in federal courts a plaintiff can recover only on the allegations of his pleadings and

cannot recover on some other act incidentally appearing in the proof."

Southern Ry. Co. v. *Montgomery,* (CCA-5) 46 F. (2d) 990.

Accord with *Montgomery* case:

Union Pac. R. Co. v. *Garner,* (CCA-8) 24 F. (2d) 53.

Horvath v. *McCord Radiator & Mfg. Co.,* (CCA-6) 100 F. (2d) 326.

Carpenter v. *Baltimore & O. R. Co.,* (CCA-6) 109 F. (2d) 375.

See also *U.S. Fid. & G. Co.* v. *Dye,* (CCA-9) 52 F. (2d) 567.

Twachtman v. *Connelly,* (CCA-6) 106 F. (2d) 501.

To allow a party to raise after the evidence is closed an entirely new and unpleaded basis of recovery merely because evidence produced *and offered* (see plaintiff's opening made *after* the Boston depositions had been taken—R. 44, 79-87) on a separate ground alleged in the pleadings happened incidentally to furnish it some support, is directly contrary to the decisions of other circuits in the *Montgomery,* the *Garner,* the *Horvath,* and the *Carpenter* cases, supra.

Any other decision directly flouts Rule 8(c) and results in manifest injustice.*

*That there was evidence which, if believed, would completely meet the inferences drawn by the court from the Boston depositions as the factual support for its rulings was shown to the Circuit Court of Appeals by affidavits from the same witnesses themselves (R. 131-5).

We submit, therefore, that the petition for certiorari should be granted.

Respectfully submitted,

FREDERICK H. NASH,
BAILEY ALDRICH.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
CHOATE, HALL & STEWART,
Of Counsel.

APR 2 1941
CHARLES ELMORE CROP
CLER

In the

Supreme Court of the United States.

October Term, 1940.

No. 824.

The Columbian National Life Insurance Company,
Petitioner,

v.

Lena M. Rodgers,
Respondent.

REPLY BRIEF OF PETITIONER FOR CERTIORARI.

F. H. NASH,
BAILEY ALDRICH,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

In the

Supreme Court of the United States.

October Term, 1940.

No. 824.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,
v.
LENA M. RODGERS,
Respondent.

REPLY BRIEF OF PETITIONER FOR CERTIORARI.

The petitioner regrets that there should develop in this case a dispute between counsel as to the facts in the record. It feels obliged to point out, however, that it deems certain statements in the respondent's brief to be unfounded.

1. The respondent states in the first two paragraphs on page 6, and in the first paragraph on page 7 of her brief that the Circuit Court of Appeals affirmed the District Court's finding that the petitioner had "actual knowledge" of the true facts. Again, at the end of page 13, the respondent states that the Circuit Court of Appeals "approved and sustained the trial court's finding of actual knowledge on the part of the petitioner."

The petitioner respectfully suggests that a reading of the opinion below, beginning at the bottom of Record p. 117, conclusively shows that the only finding which the

Circuit Court of Appeals supported is the finding of imputed knowledge through an alleged duty of inquiry. It in no way passed upon the finding of actual knowledge, and the last sentence in the opinion, referred to by the respondent, cannot be construed, in the light of the balance of the opinion, to the contrary. If the Circuit Court of Appeals had been willing to support the District Court in its finding of actual knowledge, the greater part of its opinion would not have had to be written, as concededly actual knowledge would have been an end of the case.

2. The respondent says in the middle paragraph on page 8:

> "The records which it [the insurance company] had were *not* consistent with the truth of the statements in the application."

No argument or evidence is furnished in support of this statement of the respondent's. None could be. The records were entirely consistent. See petitioner's brief, top of page 10, and top of page 11.

3. The respondent at the middle of page 8 states as follows:

> "neither was the misrepresentation of the assured 'conscious and deliberate'. There never was a finding that insured made a conscious and deliberate misrepresentation."

In its first opinion the Circuit Court of Appeals stated:

> "We are of the opinion that the minds of reasonable men could reach but one conclusion upon the evidence adduced, namely, that the statements made by the

insured to the Insurance Company were knowingly false."

Columbian National Life Ins. Co. v. *Rodgers*, 93 F. (2d) 740, 742.

As pointed out in petitioner's original brief, the testimony material to this subject was entirely by deposition and was word for word identical at the first trial and the second. The respondent's seeming contention that the first decision is not the law of the case and is not binding is raised for the first time in this Court, and is entirely unfounded. The so-called law of the Tenth Circuit in no way differs from the applicable Kansas law. Furthermore, what constitutes proof that a particular statement is "knowingly false" is purely a question of evidence and not one of state law. In the light of the court's ruling that the misrepresentations as matter of law must be found to be knowingly false, the respondent's statement that there was no finding of conscious and deliberate falsehood, if based upon a distinction between a finding and a ruling, is pointless, and if between knowingly, conscious and deliberate, is mere verbiage.

Respectfully submitted,

F. H. NASH,
BAILEY ALDRICH.

13

FILED
MAR 29 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 824

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
PETITIONER,

v.

LENA M. RODGERS,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT STONE,
Topeka, Kansas,

ROY L. HAMILTON,
Beloit, Kansas,

ROBERT L. WEBB,
Topeka, Kansas,

Attorneys for Respondent.

KELLEY PRINTING CO., TOPEKA

INDEX.

Page

Opinions Below 1

Statement 3

Argument:

1. The Findings will not be disturbed 6

2. The Petitioner had the duty to make inquiry 7

3. The Circuit Court of Appeals decided pleaded issues 11

TABLE OF CASES.

A. L. I. Restatement of the Law of Agency, Vol. 1, § 9 (c) 12

Armourdale State Bank v. Homeland Ins. Co., 134 Kan. 245; 5 Pac. 2d 786 12

Avery v. Commissioner of Internal Revenue, 22 Fed. 2d 6, 7 12

Blades v. Insurance Co., 116 Kan. 120; 225 Pac. 1082 9

Bowland v. McDowell, 132 Kan. 820, 822; 297 Pac. 691 12

Bruington v. Wagoner, 100 Kan. 439, 441; 164 Pac. 1057 6

Carver v. Fraternal Citizens, 103 Kan. 824; 176 Pac. 634 9

Dangerfield v. R. R. Co., 62 Kan. 85 11

Dunlap v. Denison, 83 Kan. 757; 112 Pac. 598 12

Erie R. Co. v. Tompkins, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188; 114 A. L. R. 1487 ..... 9, 10

Galloway v. Insurance Co., 112 Kan. 720; 212 Pac. 887 9

Harvester Co. v. Hardware Co., 101 Kan. 488; 167 Pac. 1057 11

TABLE OF CASES—(Continued)

	Page
I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429; 47 S. Ct. 136	6
Maelzer v. Swan, 75 Kan. 496, 498, 499; 89 Pac. 1037	12
Mangum v. Stadel, 76 Kan. 764; 92 Pac. 1093	12
Murray v. Davies, 77 Kan. 767; 94 Pac. 283	10
Newton v. New York Life Insurance Co., 95 Kan. 427; 148 Pac. 619	6
Page v. Arkansas Natural Gas Corporation, 286 U. S. 269; 52 S. Ct. 507	6
Priest v. Life Insurance Co., 116 Kan. 421; 227 Pac. 538	10
20 R. C. L., § 7, p. 346, Notice	12
Scott v. National Reserve Life Insurance Co., 143 Kan. 678, 680; 56 Pac. 2d 76	9
Scully v. Porter, 57 Kan. 322, 326; 46 Pac. 313	12
Speed v. Hollingsworth, 54 Kan. 436; 38 Pac. 496	10
Stadel v. Aikins, 65 Kan. 82; 68 Pac. 1088	12
Stanley v. Indemnity Association, 112 Kan. 412, 416; 210 Pac. 1096	12
Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548; 50 S. Ct. 427	6
United States v. Chemical Foundation, 272 U. S. 1; 47 S. Ct. 1	6
United States v. Commercial Credit Co., 286 U. S. 63; 52 S. Ct. 467	6
United States v. Mammoth Oil Co., 14 Fed. 2d 705	9
Vaughn v. Hixon, 50 Kan. 773	11
Zolintakis v. Equitable Life Assurance Society, 108 Fed. 2d 902	9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 824

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
PETITIONER,

v.

LENA M. RODGERS,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

This case was tried to the court without a jury and, although the trial court filed no opinion it made and filed findings of fact and conclusions of law. (R. 34, 35) The only official report of this case is printed in 116 Fed. 2d 705. The District Court's findings of fact and conclusions of law are as follows:

"Findings of Fact.

1. Paul W. Rodgers was issued a policy of life insurance in the sum of $10,000 on February 28, 1935, in the defendant company, in which policy the plaintiff was named as beneficiary. A full year's premium was paid in advance and said policy had never been cancelled. Paul W. Rodgers was killed on August 4, 1935, and due proof of death was made by the plaintiff on August 24, 1935.

2. When it issued the policy of insurance herein, the defendant company had full notice and actual knowledge of all facts relating to the previous insurance record of Paul W. Rodgers which included the fact that Rodgers had been declined life insurance by the John Hancock Mutual Life Insurance Company in March, 1934.

3. Prior to the date when it issued the policy sued on the defendant company was in possession of facts which put the defendant on the alert and which were in conflict with statements contained in the application of Rodgers for the insurance policy sued on, which application was then being considered by the defendant. Those facts and the circumstances surrounding them were of a character such that ordinary diligence on the part of the defendant and inquiry based on such facts and made by the defendant to the sources available to it would have brought to the defendant, prior to the issuance of its insurance policy on his life, actual knowledge of Rodgers' previous rejection by John Hancock Mutual Life Insurance Company.

4. At the time Paul W. Rodgers made his application to the defendant insurance company for the policy issued in this case, said applicant Rodgers did not knowingly misstate any facts in said application, and did not knowingly misrepresent the facts respecting any matters inquired about in said application.

Conclusions of Law.

The Court concludes as a matter of law that:

I.

Prior to and at the time it issued the policy sued on the defendant had knowledge of the fact that the insured Rodgers had been declined insurance by John Hancock Mutual Life Insurance Company.

II.

By issuing its policy sued on herein, the defendant waived any defense based on misrepresentation which otherwise may have appeared in Rodgers' application made to defendant for insurance, and the defendant is estopped in law from asserting as a defense in this action the misrepresentations of which it complains.

III.

The plaintiff is entitled to judgment against the defendant in the sum of $10,000 with interest at 6% per annum from August 24, 1935, and the costs of this action." (R. 34, 35)

STATEMENT.

The District Court entered a decree in accordance with its findings and conclusions (R. 35, 36) and the defendant (petitioner) appealed. In its opinion the Circuit Court of Appeals states: (p. 706)

> "The only question involved is whether the insurance company was possessed of facts concerning the subject, or might have ascertained the true facts by further investigation, having been put upon inquiry by information before it when it issued the policy sued on herein."

In the concluding paragraph of its opinion, the Circuit Court of Appeals answers in the affirmative when it says:

> "This case was tried by the court without a jury. Substantial evidence was submitted in support of the facts upon which an equitable estoppel was created. The material findings and the judgment are fully supported by competent evidence. The judgment is affirmed." (l. c. 708)

The Circuit Court of Appeals did not rest its decision on the matters argued in petitioner's motion and brief but rather it answered the argument raised on appellant's (petitioner's) brief and oral argument in that court. The petitioner does not mention plaintiff's Exhibit 17 (R. 93, 94) This letter was from the Medical Examiner of the defendant company to its general agent who wrote the policy of insurance, and briefly states that the reason for the delay in taking prompt action on the application of insured is—"We are investigating applicant's previous insurance record." This letter is dated February 15, 1935, some ten days after the application had been made, and the policy was not issued until thirteen days later, February 28, 1935.

The Circuit Court of Appeals commented on this very matter (p. 707), mentioned that the rejection card turned in by the John Hancock Company was in the possession of the defendant company and was before its proper agents at the time of the issuance of the policy sued on herein, and further said:

> "In the instant case, the insurance company notified its agent that the reason for the delay in taking

prompt action on the application of Paul W. Rodgers, was that appellant was investigating the applicant's previous insurance record."

The court also says the evidence conclusively shows that the card indicated that a criticism of the applicant had been made by another company. (p. 707)

The petitioner's chief underwriter testified:

"I would delay action on the application until the matter had been investigated, until a communication had been sent to the company taking the adverse action, and a reply received; the practice is universal; all companies do it. (R. 73)

I would delay action and make inquiries. (R. 74)

The card indicated a general criticism. It might have been a rejection by another company. (R. 84) It would put defendant 'on the alert'." (R. 85)

He knows the cards come from the Recording and Statistical Corporation, (R. 85) and:

"We send an inquiry through them, and from them it goes to the reporting company, and then the report will come back to us from the reporting company." (R. 85)

SUMMARY OF ARGUMENT.

1. The Findings will not be disturbed.
2. The Petitioner had the duty to make inquiry.
3. The Circuit Court of Appeals decided pleaded issues.

ARGUMENT.

The Findings Will Not Be Disturbed.

The District Court found that defendant company (petitioner herein) had full notice and knowledge of all the facts relating to the previous insurance record of the applicant. (Finding No. 2, R. 35)

In the concluding paragraph of its opinion, the Circuit Court of Appeals finds that—"The material findings and the judgment are fully supported by competent evidence. The judgment is affirmed."

This is conclusive on the petitioner.

Findings of Fact Concurred in by Two Lower Courts will not be Disturbed unless Clearly Erroneous.

United States v. Commercial Credit Co., 286 U. S. 63, 52 S. Ct. 467.

Page v. Arkansas Natural Gas Corporation, 286 U. S. 269, 52 S. Ct. 507.

I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 S. Ct. 136.

United States v. Chemical Foundation, 272 U. S. 1, 47 S. Ct. 1.

Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427.

See also *Bruington v. Wagoner,* 100 Kan. 439, 441; 164 Pac. 1057.

> " *** and when the facts are found by the jury and approved by the court, or by the trial court alone if a jury is waived or if it is not a case triable by a jury, the controversy over the facts is ended." (l. c. 441)

See also *Newton v. New York Life Insurance Co.,* 95 Kan. 427; 148 Pac. 619.

The Petitioner had the Duty to Make Inquiry.

The respondent does not deem this point to be controlling in this case for the reason that it proved actual notice, the District Court so found and that finding was affirmed by the Circuit Court of Appeals.

The petitioner argues that it had no duty to make inquiry unless the statements made by the applicant appeared "unreasonable and improbable." That contention might be good in law if the petitioner had had no knowledge of facts contrary to the statements made by the applicant; but it could not shut its eyes and disregard information which it had at the time it considered the application and which

> "means something to the underwriter." (R. 108)
>
> means that another company has created a record concerning him which might be a rejection. (R. 109)
>
> compelled the company to delay action on an application until the matter can be investigated and until a reply has been received from the company taking adverse action. (R. 57, 73, 74, 84, 85)
>
> put the underwriter on the alert. (R. 85)
>
> and on account of which the company sends an inquiry through Recording and Statistical Corporation, the response to which comes from the rejecting company. (R. 85)

The petitioner had this record before it at the time it considered the instant application (R. 87); and thereafter and thirteen days before the policy was issued the petitioner made an investigation of the applicant's previous

insurance record (Ex. 17, R. 93, 94). Granting that in the first instance the petitioner had no obligation to make any independent investigation, it may not embark upon such an investigation, ascertain facts which not only made the applicant's statements "unreasonable and improbable" but which on their face were contrary to the applicant's statements, and then fail, if in fact it did fail, to develop the information which it had acquired. The petitioner could neither in law nor in good faith commence an investigation and, having ascertained the facts which it did in this case, fail to complete it.

At page 4 of its petition, the petitioner predicates its application for writ on false assumptions. The records which it had were *not* consistent with the truth of the statements in the application, neither was the misrepresentation of the assured "conscious and deliberate". There never was a finding that insured made a conscious and deliberate misrepresentation.

On this trial, the District Court found that insured did not knowingly misstate any facts in his application. (Finding No. 4, R. 35) In the first opinion by the Circuit Court of Appeals, 93 Fed. 2d 740, l. c. 742, under the evidence on the first trial, the court said that it must be concluded that the statements made by the insured were knowingly false but that proof of actual, conscious purpose to defraud is unnecessary to invalidate the policy, applying the then rule of the Tenth Circuit.

From the foregoing, it would appear that the reasons given by petitioner for granting the writ must fail.

The decision in this case was handed down December 27, 1937, before the case of *Erie R. Co. v. Tompkins,* 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188, was decided on April 25, 1938.

The Kansas court holds that fraud is never presumed but must be established by clear, unequivocal and convincing evidence. *United States v. Mammoth Oil Co.,* (C. C. A. — 8) 14 Fed. 2d 705. *Scott v. National Reserve Life Insurance Co.,* 143 Kan. 678, at page 680; 56 Pac. 2d 76.

> "A mere misstatement, unless willful and fraudulent, will not void the policy."
>
> "Of course, it takes more than falsehoods to constitute fraud."

Also:

> Blades v. Insurance Co., 116 Kan. 120; 225 Pac. 1082.
>
> Carver v. Fraternal Citizens, 103 Kan. 824; 176 Pac. 634.
>
> Galloway v. Insurance Co., 112 Kan. 720; 212 Pac. 887.

In the last mentioned case, the Supreme Court of Kansas approved an instruction that if the insured acted in good faith—

> "and the answers were made without fraud or intention to deceive or suppress the facts, then such answers, even though not literally true, would not void the policy or defeat the liability of the defendant thereon. The test is the good faith of the deceased in making the answers she did."

See also *Zolintakis v. Equitable Life Assurance Society,* (C. C. A—10) 108 Fed. 2d 902.

As a result of the first decision by the Circuit Court of Appeals, this case went back to the District Court for a new trial which was had on October 2, 1939, *after the decision in Erie R. Co. v. Tompkins*, supra. The law of Kansas then governed and now governs, and the pronouncements made by the Circuit Court of Appeals in its first opinion do not become the law of this case but they become a nullity. The trial court found that the petitioner had full knowledge of all of the facts prior to the issuance of the policy, (Finding No. 2); that it had certain facts from which it had the duty to make inquiry, as a result of which it could and would have learned all facts, (Finding No. 3); and that the applicant did not knowingly misstate any fact in his application, (Finding No. 4, R. 34, 35); and the trial court concluded as a matter of law that the petitioner had knowledge of all facts (Conclusion No. I) and it waived any defense which it might base on misrepresentation and estopped itself from asserting such defense. (Conclusion II, R. 35)

The findings and judgment were approved by the Circuit Court of Appeals.

The Cases Cited by Petitioner are not in Point.

In none of the cases of Speed v. Hollingsworth, 54 Kan. 436; 38 Pac. 496; Murray v. Davies, 77 Kan. 767; 94 Pac. 283; or Priest v. Life Insurance Co., 116 Kan. 421; 227 Pac. 538, did the adverse party have any knowledge to put him on the alert or any reason or obligation to make inquiry.

In the case of *Dangerfield v. R. R. Co.*, 62 Kan. 85, the party against whom estoppel was sought had no knowledge of the misrepresentation or the facts leading up to it.

The same is true in *Vaughn v. Hixon*, 50 Kan. 773.

In the instant case the insured was *not* held to be guilty of a deliberate, conscious and willful falsehood. (Decision on first appeal, 93 Fed. 2d 740, and findings of the court on the second trial, R. 34, 35.)

In *Harvester Co. v. Hardware Co.*, 101 Kan. 488; 167 Pac. 1057, cited by the petitioner, where the director of a corporation had been deceived by fraudulent statements concerning the status of his corporation the Kansas court refused to charge such director with constructive knowledge of the condition of the corporation since it said it would not impute knowledge on "some legal theory"—(without any knowledge of the facts).

The Circuit Court of Appeals Decided Pleaded Issues.

The petitioner contends that it defended this action on one theory and had no warning that estoppel would be relied upon by the respondent.

In her reply the respondent fully pleaded this very information and the means of knowledge of the petitioner and the fact that the petitioner had knowledge. She pleaded further that the petitioner had estopped itself from asserting a defense based upon misrepresentation. (R. 24) It is the respondent's position that the rule in Kansas is and for many years has been:

> Knowledge which is sufficient to lead an ordinarily prudent person to make inquiry, when by such inquiry it can easily ascertain the facts, constitutes notice of whatever such inquiry would disclose and will be regarded in law as knowledge of the facts.
>
> Stanley v. Indemnity Association, 112 Kan. 412, 416; 210 Pac. 1096.
> Bowland v. McDowell, 132 Kan. 820, 822; 297 Pac. 691.
> Armourdale State Bank v. Homeland Ins. Co., 134 Kan. 245; 5 Pac. 2d 786.
> Dunlap v. Denison, 83 Kan. 757, 760; 112 Pac. 598.
> 20 R. C. L., § 7, p. 346, Notice.
> A. L. I., Restatement of the Law of Agency, Vol. 1, § 9 (c).
> Avery v. Commissioner of Internal Revenue, 22 Fed. 2d 6, 7 (C. C. A.—5)
> Scully v. Porter, 57 Kan. 322, 326; 46 Pac. 313.
> Stadel v. Aikins, 65 Kan. 82; 68 Pac. 1088.
> Maelzer v. Swan, 75 Kan. 496, 498, 499; 89 Pac. 1037.
> Mangum v. Stadel, 76 Kan. 764; 92 Pac. 1093.

and the respondent could not in good conscience accept the facts which it had without making full development and use of them.

At the conclusion of the oral argument in the second trial of this case, the petitioner asked leave to reopen the case for the purpose of taking further testimony of the witness Baker. (R. 26) At the first trial the petitioner introduced the testimony of officers of the petitioner taken on its behalf. At the second trial there was introduced that testimony together with the testimony of other witnesses including Baker, which had been taken

on behalf of the respondent. The petitioner had had ample opportunity to produce whatever testimony it desired and the trial court held that its application to reopen the case came too late. Such a ruling could not be an abuse of discretion.

A reading of the opinion by the Circuit Court of Appeals, 116 Fed. 2d 705, (R. 115) shows conclusively that not only did the appellate court approve the trial court's judgment based upon equitable estoppel but that it approved and sustained the trial court's finding of actual knowledge on the part of the petitioner.

We respectfully contend that the petition for the writ should be denied.

Respectfully submitted,

ROBERT STONE,
Topeka, Kansas,
ROY L. HAMILTON,
Beloit, Kansas,
ROBERT L. WEBB,
Topeka, Kansas,
Attorneys for Respondent.

END OF

A CASE